# The Burger Court Opinion Writing Database

## *Vance v. Universal Amusement Co.*

445 U.S. 308 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University




Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 10, 1979

Re: 78-1588 Vance v. Universal Amusement Co.

Dear Lewis:

I accept your "abdication". However there is no occasion for a "trade" since there is no comparable canine special in the last week's "litter". I will ask someone else to try to deal with this critter.

Regards,

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 12, 1979

RE: 78-1588 - Vance v. Universal Amusement Co.

MEMORANDUM TO THE CONFERENCE:

Lewis advises me that his view of this very muddled case is such that he cannot develop a resolution acceptable to a majority.

I will therefore re-assign to John Stevens and leave it to him whether it can be a per curiam or otherwise.

Regards,

WEB

P.S. DFWPPFQ might still be the best solution.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 19, 1980

Re: 78-1588 - Vance v. Universal Amusement Co., Inc.

MEMORANDUM TO THE CONFERENCE:

We were unanimous at Conference on one aspect of this case: that it was a miserable case, miserably briefed and argued. Several voices (mine included) urged that the case should get an appellate variation of "DIG" with pointed comment on the inadequacy of the presentation, as Lewis has done.

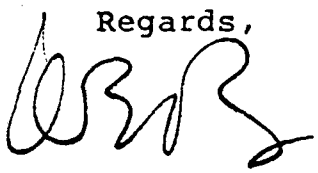
John had the difficult--and unwelcome--job of trying to put together a disposition. The basis of the disposition leaves me where I was originally, and I renew the suggestion that the least undesirable disposition here is something akin to a "DIG." In light of the Attorney General's concession at oral argument, which Lewis has highlighted, that he "[didn't] know that the prosecutor after more than two rounds will ever use [this statute] again," this case recalls our decision in Poe v. Ullman, 367 U.S. 497 (1961). There, the plurality opinion concluded that:

> The fact that the [State] has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is the indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. Id. at 508-509.

See also Bill Brennan's concurring opinion, opting to dismiss the appeal "for failure to present a real and substantial controversy...." Id. at 509.

Not without considerable reluctance, I recommend something along these lines since we add nothing to the jurisprudence by accomodating parties who have served us so poorly. In making this recommendation I am aware that John has labored mightily and that his Per Curiam has a Court.

Regards,



To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAR 4 1980

1st DRAFT Recirculated: _____

# SUPREME COURT OF THE UNITED STATES

No. 78–1588

Carol Vance et al., Appellants, *v.* Universal Amusement Co., Inc., et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[March —, 1980]

MR. CHIEF JUSTICE BURGER, dissenting.

I would dismiss the appeal for failure to present a substantial controversy "of the immediacy which is the indispensable condition of constitutional adjudication." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion). Alternatively, I would abstain from decision until the Texas courts interpret the challenged statute. I would not reach the merits of this "dispute" at this stage.

This Court's power of constitutional review is "most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity." *Id.*, at 503. This case quite plainly fails to satisfy that rigorous standard. Here, Texas has conceded that the injunctive remedy of Art. 4667 (a) is not likely to be used by any Texas prosecutor. See dissent of MR. JUSTICE POWELL, *post*, at 1–2. In light of this concession, this case recalls *Poe* itself. There Mr. Justice Frankfurter [redacted] concluded:

> "The fact that the [State] has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is the indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows." 367 U. S., at 508.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 4, 1980

RE: 78-1588 - Vance v. Universal Amusement Co., Inc.

Dear Lewis:

I join your dissent.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Lewis: See memo changes as marked WEB

I'll withdraw my opinion

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

L.F.P 3/13

No. 78-1588

Carol Vance et al., Appellants, *v.* Universal Amusement Co., Inc., et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[March —, 1980]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL joins, dissenting.

I would dismiss the appeal for failure to present a real and substantial controversy "of the immediacy which is the indispensable condition of constitutional adjudication." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion). Alternatively, I would abstain from decision until the Texas courts interpret the challenged statute; I would not reach the merits of this "dispute" at this stage.

This Court's power of constitutional review is "most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity." *Id.*, at 503. This case quite plainly fails to satisfy that rigorous standard. Here, Texas has conceded at oral argument that the injunctive remedy of Art. 4667 (a) is not likely to be used by any Texas prosecutor.[1] In

[1] "QUESTION: Well, what does it—why, then, do you need [this statute], if it is the equivalent of the Texas criminal law?

"MR. ZWEINER: I am not sure that we do, to be frank; but—

"QUESTION: What does it add to the criminal law. It changes the burden of proof, it deprives a person of a jury trial.

"MR. ZWEINER: I don't think it adds anything. As a matter of fact I think it is a cumbersome process and I don't know that the prosecutor after more than two rounds will ever use it again. . . ." Tr. of Oral Arg. 36-37.

CHANGES AS MARKED:

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

2nd DRAFT

Recirculated: MAR 14 1980

# SUPREME COURT OF THE UNITED STATES

No. 78-1588

Carol Vance et al., Appellants, *v.* Universal Amusement Co., Inc., et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[March —, 1980]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL joins, dissenting.

I would dismiss the appeal for failure to present a real and substantial controversy "of the immediacy which is the indispensable condition of constitutional adjudication." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion). Alternatively, I would abstain from decision until the Texas courts interpret the challenged statute; I would not reach the merits of this "dispute" at this stage.

This Court's power of constitutional review is "most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity." *Id.*, at 503. This case quite plainly fails to satisfy that rigorous standard. Here, Texas has conceded at oral argument that the injunctive remedy of Art. 4667 (a) is not likely to be used by any Texas prosecutor.[1] In

[1] "QUESTION: Well, what does it—why, then, do you need [this statute], if it is the equivalent of the Texas criminal law?

"MR. ZWEINER: I am not sure that we do, to be frank; but—

"QUESTION: What does it add to the criminal law. It changes the burden of proof, it deprives a person of a jury trial.

"MR. ZWEINER: I don't think it adds anything. As a matter of fact I think it is a cumbersome process and I don't know that the prosecutor after more than two rounds will ever use it again. . . ." Tr. of Oral Arg. 36-37.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 31, 1980

Re: No. 78-1588 Vance v. Universal Amusement Co.

Dear John:

I agree. Please join me in the per curiam.

Sincerely,

Bill

Mr. Justice Stevens
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 29, 1980

Re: No. 78-1588, Vance v. Universal Amusement Co.

Dear John,

I agree with your proposed per curiam.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 30, 1980

Re: No. 78-1588 - Vance v. Universal Amusement Co., Inc.

Dear John,

It may not come off, but I am considering a dissent in this case.

Sincerely yours,

Mr. Justice Stevens

Copies to the Conference

cmc

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnqu
Mr. Justice Steven

From: Mr. Justice White

Circulated: 11 FEB 19

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 78–1588

Carol Vance et al., Appellants, v. Universal Amusement Co., Inc., et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[February —, 1980]

MR. JUSTICE WHITE, dissenting.

The Court today invalidates, as an unconstitutional prior restraint, a Texas public nuisance statute authorizing courts to grant injunctive relief against the future commercial exhibition of unnamed, obscene motion pictures. In my view, this statute is no more intrusive on First Amendment values than a criminal statute barring exhibition of obscene films. Because an appropriately worded criminal statute would unquestionably be constitutional, I would uphold the Texas public nuisance statute also.

The Court's analysis of Art. 4667 (a) of the Texas Revised Civil Statutes glosses over what I take to be a crucial feature of that law. Before an exhibitor can be found to have violated an Art. 4667 (a) injunction, there must be two quite separate judicial proceedings. First, the plaintiff must obtain temporary or permanent injunctive relief against the habitual use of the subject premises for the commercial exhibition of obscene motion pictures. Second, the exhibitor must be found in criminal or civil contempt for violating the terms of the injunction. When these separate proceedings are carefully distinguished, it becomes apparent that neither individually nor jointly do they impose an impermissible burden on the exercise of First Amendment freedoms.

The initial injunctive proceeding is both substantively and procedurally sound under our precedents. Although the lack

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 20, 1980

Re: 78-1588 - Vance v. Universal Amusement

Dear Chief,

I should like to do some more work on this case and hope that if another vote is to be taken on its disposition, that it be put over at least another week.

Sincerely yours,

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 7 MAR 19

Substantially rewritten

Pp. 1, 3, 4 & 5

**2nd DRAFT**

# SUPREME COURT OF THE UNITED STATES

No. 78-1588

Carol Vance et al., Appellants, *v.* Universal Amusement Co., Inc., et al. } On Appeal from the United States Court of Appeals for the Fifth Circuit.

[February —, 1980]

MR. JUSTICE WHITE, dissenting.

The Court of Appeals invalidated Art. 4667 (a) of the Texas Revised Civil Statutes for what I understand to be two distinct reasons. Neither is valid, and to the extent that the Court falls into the same error, I respectfully dissent.

## I

The Court of Appeals first characterized Art. 4667 (a) as a prior restraint on expression and invalidated it for this reason. I disagree. In my view, Art. 4667 (a), standing alone, intrudes no more on First Amendment values than would a criminal statute barring exhibition of obscene films in terms that would be valid under our cases.

The Court of Appeals' analysis of Art. 4667 (a), and that of this Court as well, glosses over what I take to be a crucial feature of that law. Before an exhibitor can be found to have violated an Art. 4667 (a) injunction, there must be two quite separate judicial proceedings. First, the plaintiff must obtain temporary or permanent injunctive relief against the habitual use of the subject premises for the commercial exhibition of obscene motion pictures. Second, the exhibitor must be found in criminal or civil contempt for violating the terms of the injunction. When these separate proceedings are carefully distinguished, it becomes apparent that neither individually nor jointly do they impose an impermissible burden on the exercise of First Amendment freedoms.

P. 1 Stylistic

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquis
Mr. Justice Stevens

From: Mr. Justice Whit

Circulated: _____

Recirculated: 3-12-8

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 78–1588

Carol Vance et al., Appellants, *v.* Universal Amusement Co., Inc., et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[February —, 1980]

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The Court of Appeals invalidated Art. 4667 (a) of the Texas Revised Civil Statutes for what I understand to be two distinct reasons. Neither is valid, and to the extent that the Court falls into the same error, I respectfully dissent.

I

The Court of Appeals first characterized Art. 4667 (a) as a prior restraint on expression and invalidated it for this reason. I disagree. In my view, Art. 4667 (a), standing alone, intrudes no more on First Amendment values than would a criminal statute barring exhibition of obscene films in terms that would be valid under our cases.

The Court of Appeals' analysis of Art. 4667 (a), and that of this Court as well, glosses over what I take to be a crucial feature of that law. Before an exhibitor can be found to have violated an Art. 4667 (a) injunction, there must be two quite separate judicial proceedings. First, the plaintiff must obtain temporary or permanent injunctive relief against the habitual use of the subject premises for the commercial exhibition of obscene motion pictures. Second, the exhibitor must be found in criminal or civil contempt for violating the terms of the injunction. When these separate proceedings are carefully distinguished, it becomes apparent that neither individually nor jointly do they impose an impermissible burden on the exercise of First Amendment freedoms.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 28, 1980

Re: No. 78-1588 - Vance v. Universal Amusement Co.

Dear John:

I await the dissent.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 14, 1980

Re: No. 78-1588 - Vance v. Universal Amusement Co.

Dear John:

I agree with your proposed Per Curiam.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 31, 1980

Re: No. 78-1588 - Vance v. Universal Amusement Co.

Dear John:

I go along with the proposed per curiam.

Unless you have some reason for not doing so, should this not be a signed opinion?

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 10, 1979

78-1588 Vance v. Universal Amusement Co.

Dear Chief:

I note, from the assignment sheet, that you want me to write a PC in the above case.

My vote at Conference was to dismiss the case for want of an adequately presented federal question. This is still my vote.

Accordingly, I suppose the case should be reassigned unless you want me to write an opinion for the Court and also a brief dissent. Apart from the non-briefing and non-argument by the State of Texas (and a third-rate brief by appellee), I have viewed the case as a non-case. The Assistant Attorney General who argued it, stated that he did not expect it to be enforced:

> "QUESTION: Well, what does [the Texas injunction statute] -- why, then do you need it, if it is the equivalent of the Texas criminal law?
>
> MR. ZWIENER: I am not sure that we do, to be frank; but --
>
> QUESTION: What does it add to the criminal law. It changes the burden of proof, it deprives a person of a jury trial.
>
> MR. ZWIENER: I don't think it adds anything. As a matter of fact, I think it is a cumbersome process and I don't know that the prosecutor after more than two rounds will ever use it again." Tr. 36, 37.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: FEB 12 1980

Recirculated: _____

2/12/80

No. 78-1588, Vance v. Universal Amusement Co.

MR. JUSTICE POWELL, dissenting.

As I do not believe the appeal presents adequately a live federal question, I would dismiss it. The first sentence in the Court's opinion describes it as an "unusual obscenity case." Several factors suggest that the Court should not rule on its merits.

First, the provisions of the Texas statute are so "unusual" that they may be unique. Moreover, the case arises in a singularly abstract posture. Rather than review the constitutionality of the Texas law as applied to particular facts, we have been asked to consider only its facial validity. But we cannot address that question with any confidence that we understand the applicable Texas procedures. Many questions of Texas law have been raised, but few answered. For example, the Assistant Attorney General for Texas was uncertain of the distinction between civil and criminal contempt in that State, or the burden of proof in either proceeding. Tr. of Oral Arg. 16. Similarly, counsel for appellees did not know what size jury is used in a Texas contempt proceeding. Id., at 35-36. "So

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

2-14-80

Circulated: FEB 14 1980

1st DRAFT

Recirculated: _____

# SUPREME COURT OF THE UNITED STATES

No. 78–1588

Carol Vance et al., Appellants,
*v.*
Universal Amusement Co., Inc., et al.

On Appeal from the United States Court of Appeals for the Fifth Circuit.

[February —, 1980]

MR. JUSTICE POWELL, dissenting.

As I do not believe the appeal presents adequately a live federal question, I would dismiss it. The first sentence in the Court's opinion describes it as an "unusual obscentity case." Several factors suggest that the Court should not rule on its merits.

First, the provisions of the Texas statute are so "unusual" that they may be unique. Moreover, the case arises in a singularly abstract posture. Rather than review the constitutionality of the Texas law as applied to particular facts, we have been asked to consider only its facial validity. But we cannot address that question with any confidence that we understand the applicable Texas procedures. Many questions of Texas law have been raised, but few answered. For example, the Assistant Attorney General for Texas was uncertain of the distinction between civil and criminal contempt in that State, or the burden of proof in either proceeding. Tr. of Oral Arg. 16. Similarly, counsel for appellees did not know what size jury is used in a Texas contempt proceeding. *Id.*, at 35–36. "So fragile a record is an unsatisfactory basis on which to entertain this action for declaratory relief." *Public Affairs Press* v. *Rickover*, 369 U. S. 111, 114 (1962).

Perhaps most significant, the statute at issue here appears to be a dead letter in Texas, as the Assistant Attorney General who represented the State informed us at oral argument.

"QUESTION: Well, what does it—why, then, do you

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 20, 1980

78-1588 Vance v. Universal Amusement Co.

Dear Chief:

The oral argument convinced me that this case had been reduced to "empty shadows", and that we should find some appropriate language to dismiss it.

But my view did not prevail at Conference and John has invested considerable time in writing an opinion. I could join a disposition along the lines you suggest as, in substance, it seems to be substantially what I have circulated.

But John has a Court, and I certainly would defer to him and those who have joined him - retaining, of course, my own view.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 4, 1980

78-1588 Vance v. Universal Amusement Co.

Dear Chief:

Please join me in your dissent.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 13, 1980

78-1588 Vance v. Universal Amusement Co.

Dear Chief:

As I have joined your dissent, and as it develops the reasons for dismissal more fully than my dissenting opinion, I see no purpose in filing both.

Accordingly, I will withdraw my dissenting opinion.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 11, 1980

Re: No. 78-1588 Vance v. Universal Amusement Co.

Dear Byron:

Please join me in your dissent.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 10, 1980

Re: No. 78-1588 - Vance v. Universal Amusement Co.

Dear Byron:

Please rejoin me in your circulation of March 7th.

Sincerely,

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JAN 25 '80

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 78–1588

Carol Vance et al., Appellants, v. Universal Amusement Co., Inc., et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[February —, 1980]

PER CURIAM.

The question presented in this unusual obscenity case is whether the United States Court of Appeals for the Fifth Circuit correctly held a Texas public nuisance statute unconstitutional. The Court of Appeals read the Texas statute as authorizing a prior restraint of indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt review of a preliminary finding of probable obscenity. Cf. *Freedman* v. *Maryland*, 380 U. S. 51; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546. In this Court, Texas argues that such a restraint is no more serious than that imposed by its criminal statutes and that it is therefore constitutional. We find Texas' argument unpersuasive and affirm the judgment of the Court of Appeals.

In 1973, appellee operated an indoor, adults-only motion picture theater. In October of that year, appellee's landlord gave notice that the theater's lease would be terminated. The notice stated that the County Attorney had informed the landlord that he intended to obtain an injunction to abate the theater as a public nuisance in order to prevent the future showing of allegedly obscene motion pictures. Appellee responded by filing suit in the United States District Court for the Northern District of Texas seeking an injunction and

pp. 4, 9
Footnotes Renumbered.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: FEB 12 '80

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 78–1588

Carol Vance et al., Appellants, v. Universal Amusement Co., Inc., et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[February —, 1980]

PER CURIAM.

The question presented in this unusual obscenity case is whether the United States Court of Appeals for the Fifth Circuit correctly held a Texas public nuisance statute unconstitutional. The Court of Appeals read the Texas statute as authorizing a prior restraint of indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt review of a preliminary finding of probable obscenity. Cf. *Freedman* v. *Maryland*, 380 U. S. 51; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546. In this Court, Texas argues that such a restraint is no more serious than that imposed by its criminal statutes and that it is therefore constitutional. We find Texas' argument unpersuasive and affirm the judgment of the Court of Appeals.

In 1973, appellee operated an indoor, adults-only motion picture theater. In October of that year, appellee's landlord gave notice that the theater's lease would be terminated. The notice stated that the County Attorney had informed the landlord that he intended to obtain an injunction to abate the theater as a public nuisance in order to prevent the future showing of allegedly obscene motion pictures. Appellee responded by filing suit in the United States District Court for the Northern District of Texas seeking an injunction and

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1980

Re: 78-1588 - Vance v. Universal Amusement

Dear Chief:

If there were a legally sufficient way to dispose of this case without reaching the merits, I would be happy to go along even though there is a Court for the per curiam. But since this is an appeal, we cannot simply "DIG"; and since it is the State that has chosen to press the enforcement of the statute, first by threatening to sue the landlord and later by taking this appeal, I do not believe we can properly rely on the approach in Poe v. Ullman, 367 U.S. 497. Moreover, I would have great difficulty in classifying the case as moot when it is the State that is the appellant.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 20, 1980

MEMORANDUM TO THE CONFERENCE

Re: Cases Heretofore Held for No. 78-1588 Vance v. Universal Amusement Company

Chateau X, Inc, v. Andrews, No. 78-1391

In this case, a divided Supreme Court of North Carolina upheld a state statute under which petitioners were enjoined, among other things, from selling or exhibiting matter that had been adjudicated obscene. Petitioners were also enjoined from selling or exhibiting material that had not yet been before a court. The latter portion of the injunction, which is objected to here, was construed by the state court as incorporating the standards of Miller v. California, 413 U.S. 15. The court upheld the injunction, stating that there is no significant difference between a prosecution for violating a criminal statute proscribing the sale or exhibition of obscene materials and a contempt proceeding for violating an injunction like the one issued in this case. In both proceedings, the defendant can defend on the ground that the material is not legally obscene. The court thus deemed the injunction to be nothing more than a personalized criminal statute against selling obscene materials. Nothing is said in either the majority or dissenting opinions regarding the possibility of the State's obtaining temporary injunctions against the sale or exhibition of specified materials prior to an adjudication of their obscenity, which was the dispositive issue in Vance. Thus, unlike Vance, we have no lower court construction of the state law on this point to which we might defer. For that reason, I would grant, vacate and remand in light of Vance.